(10) Against both the defendants, special damages by way of fair rent for their use of lot 55 as a storage place for their building materials and as an access and working platform for their development works on the condominium site on lot 39, at the rate of $600 pm for a period of 20 months, that is to say, from August 1981 to March 1983 – $12,000.

(11) Against both the defendants, exemplary damages, in the sum of $50,000 in so far as the claims in tort relating to lot 55 are concerned.

(12) Against both the defendants, interest at the rate of 6% pa on all compensatory general damages awarded for the period from date of service of the writ until date of judgment under s 11 of the Civil Law Act 1956, and thereafter, at the rate of 8% pa until satisfaction under O 42 r 12 of the Rules of the High Court 1980.

(13) Against both the defendants, interest at the rate of 3% pa on special damages awarded for the period from date of accrual of cause of action until trial.

(14) Against both the defendants, costs of the action on the higher scale to be taxed by the senior assistant registrar of this court in default of agreement by the parties.

(15) Generally, the parties be and are hereby at liberty to apply.

Order accordingly.

Solicitors: *Gan Teik Chee & Ho; Chang & Vello.*

Reported by *Wong Kim Fatt*

Chung Khiaw Bank Ltd v Lau Ah Yen & Anor

HIGH COURT (PENANG) – SUIT NO 31-375-88
WAN ADNAN J
4 MARCH 1989

Land Law – Properties charged as security for loan – Sale of properties by public auction – No bid at auction – Whether court had power to order sale by private treaty – National Land Code 1965, ss 265 & 266(1)

The defendants were registered proprietors of properties which were charged to the plaintiffs as security for a loan. Upon the defendants' breach of provisions of the charge, the plaintiffs applied to the land administrator for an order of sale under the National Land Code. No bid was, however, obtained at the sale. The plaintiffs entered into an agreement with the purchasers for sale of the properties subject to approval of the High Court on the plaintiffs' application. The defendants also applied for leave to enter into a sale and purchase agreement of the properties.

The plaintiffs' application was dismissed in chambers at the plaintiffs' request. At hearings in open court the plaintiffs contended that the court did not have the power to order a sale of the properties by private treaty and therefore that the defendants' application should be dismissed.

Held, dismissing defendants' application:

(1) Sections 256 to 259 and ss 260 to 265 of the National Land Code contemplate a sale by public auction only and the court has no power to order sale by private treaty under any of these sections.

(2) However, pursuant to s 266(1) of the National Land Code the court may allow the properties to be sold by private treaty notwithstanding an order for sale of land by public auction provided it is satisfied that the proceeds of such sale will not be less than the amount due to the plaintiffs under the charge and that the plaintiffs will be duly paid in full out of the said proceeds.

(3) In the present case the defendants' application was to sell the properties at a price which was less than the amount still due to the plaintiffs under the charge.

[*Editorial Note:* The defendants have appealed to the Supreme Court vide Civil Appeal No 02-64-89.]

Cases referred to

1 *The Chartered Bank* v *Packiri Maideen & Anor* [1963] MLJ 276 (distd)
2 *Collector of Land Revenue Kota Bahru* v *Yusoff bin Yunus* [1977] 2 MLJ 53 (folld)

Legislation referred to

Land Code (Cap 138) ss 149 to 154
National Land Code 1965 ss 256, 259(2)(c), 260, 261, 263, 265, 266(1)
Rules of the High Court 1980 O 56 r 2(2)

Charles Rajah and *J Balan* for the purchasers.
Annamalai for the defendants.
Tan Hiang Joo for the plaintiffs in chambers.
Lim Seang Lee (Cik) for the plaintiffs.

Cur Adv Vult

Wan Adnan J: The defendants are the registered proprietors of the properties known as lots no 649 and 650 Mukim Sungei Seluang Daerah Kulim, Kedah held under SPK 4962 and 4963 ('the properties'). On 24 August 1983 they charged the properties in favour of the plaintiffs vide charge presentation no 642/83 Jilid 23 Folio 6 as security for a loan of $350,000. The properties are held under Land Office title. Upon breach by the defendants of the provisions of the charge, the plaintiffs applied to the land administrator Kulim for an order of sale under s 260 of the National Land Code. On 14 March 1987 the said land administrator ordered that the properties be sold by public auction on 8 June 1987. The reserve price was fixed at $200,000. There was no bid at the sale.

On 25 May 1988 the plaintiffs entered into an agreement with Lee Keng Huah and Khor Lye Seng ('the purchasers') whereby the plaintiffs had agreed to sell the

properties to the purchasers at the price of $200,000 subject to the approval of the High Court. Enclosure (1) is the plaintiffs' application for the said approval. The defendants entered appearance. The defendants by encl (9) also applied for leave to enter into a sale and purchase agreement for the sale of the properties to one Muniandy s/o Pachaiappan or his nominee at the price of $205,000.

Then, the purchasers came into the picture. By encl 11 they applied to be allowed to intervene and be made a party and for the order that the plaintiffs be allowed to sell the properties to them in accordance with the agreement dated 25 May 1988. In their affidavit they said they were now willing to pay $207,000 for the properties.

All the three applications came before me on 20 November 1988. During the hearing I intimated to counsel that first, the court might not have the power to order the sale by private treaty and secondly, even if the court had the power, it would not be appropriate for me to allow it in the circumstances of the case. I would not allow the proceeding before me to be turned into an auction. They then asked for a short adjournment.

On 7 December 1988 the parties were before me again. They wanted to proceed with their applications. By the affidavit affirmed on 6 December 1988 (encl 19) the defendants said that Muniandy s/o Pachaiappan had now agreed to pay $210,000 for the properties. It became very obvious to me that the intending purchasers were outbidding each other, something which should be happening only at an auction.

I first dealt with the purchasers' application to intervene in encl 11. I dismissed the application. Their purpose to be added as a party was merely to support the plaintiffs' application. They had entered into an agreement with the plaintiffs and the plaintiffs' application was for leave to carry into effect the said agreement. Their interest in the subject matter is not sufficient to entitle them to be added as a party. Their interests are already before the court through the plaintiffs' application.

I then proceeded to deal with the plaintiffs' application (encl 1) and the defendants' application (encl 9). I was surprised when counsel for the plaintiffs then requested me to dismiss the plaintiffs' application and offered no objection to the defendants' application. Although I had earlier intended to dismiss both applications so that the intending purchasers could make their bids at an auction by the district land administrator, I allowed the defendants' application that the properties be sold by private treaty at the price of $210,000 to Muniandy s/o Pachaiappan or his nominee.

Upon requests made pursuant to O 56 r 2(2) of the Rules of the High Court 1980 by the purchasers as well as the plaintiffs I heard further arguments in open court on 13 January 1989.

After hearing further arguments I allowed the purchasers' application to intervene in encl 11 and I dismissed the defendants' application in encl 9.

I allowed the purchasers to intervene because the plaintiffs had shown that they had not been acting in the interests of the purchasers. They had requested the court to dismiss their application. In the circumstances it would not be just not to allow the purchasers an opportunity of being heard.

Counsel for the defendants had raised as a preliminary objection that the court should not reopen the case because the order made on the defendants' application (encl 9) was in fact a consent order. I did not agree to this. An order does not become a consent order merely because one or the other of the parties does not object or merely because he submits to it being made. A consent order is one which embodies the true and actual consent of the parties. In this case the plaintiffs merely did not object.

Before me in open court the purchasers and the plaintiffs took a stand different from their earlier stand. Their contention now was that the court did not have the power to order sale by private treaty and that the defendants' application should be dismissed.

The land administrator had made the order of sale by public auction under s 263 of the National Land Code after holding an enquiry under s 261.

Section 265(2) and (3) of the Code states as follows:

> 265 *Procedure at sale*
>
> (1) ...
>
> (2) If at the sale no bid is received at or above the reserve price, the land or lease in question shall be withdrawn from the sale, and the Land Administrator shall direct that it be put up for auction on a subsequent date, either at the same or at a reduced reserve price, and shall give such notice of the subsequent sale as he may consider appropriate.
>
> (3) If at the subsequent sale no bid is received at or above the reserve price –
>
> (a) the land or lease shall be withdrawn from the sale;
> (b) the Land Administrator shall refer the matter to the court; and
> (c) the Court may substitute for the order of the Land Administrator an order for sale under s 256, or make such other order as it may think just.

Subsection (2) clearly provides that in the absence of any bid at or above the reserve price, the land must be withdrawn from the sale. The land administrator is then required to put up the land for a second auction. If at the second auction still no bid is received, then by virtue of

sub-s (3) the land administrator is required to refer the matter to the High Court.

In *The Chartered Bank* v *Packiri Maideen & Anor*[1] Gill J (as he then was) said:

> It is to be observed that ss 149 to 154 of the Land Code contemplate the sale of land by public auction. It is of course open to the parties to sell the lands by private treaty before any proceedings are commenced in court, but once such proceedings are commenced the lands have to be sold by public auction.

The provisions of ss 149 to 154 of the Land Code (Cap 138) are similar to the provisions of ss 256 to 259 of the National Land Code (procedure in respect of lands held under Registry title) and the provisions of ss 141 to 148 of the Land Code are similar to the provisions of ss 260 to 265 of the National Land Code (procedure in respect of lands held under Land Office Title). I do agree that the sale contemplated in Chapter 3 Part Sixteen of the National Land Code (ss 256 to 259 and ss 260 to 265 are in this Chapter) is a sale by public auction. The court cannot order any sale by private treaty. It is my view that the court has no power to order sale by private treaty even under s 265(3)(c) of the National Land Code. '... to make such other order as it may think just' to my mind does not include the power to order sale by private treaty. Under this sub-s the court may, for example, direct the land administrator to put up the land for sale by public auction for the third time at a reduced reserve price. (See *Collector of Land Revenue Kota Bharu* v *Yusoff bin Yunus*.[2]) This will be consistent with the provisions of s 259(2)(c) wherein no power is reserved to the court 'to make such other order as it may think just.' It is my view that under this subsection when there is no bid at the second auction the court may order the land to be put up for auction for the third time. In fact there is no limit as to the number of times the land can be put up for auction and for each time the court may reduce the reserve price.

However, this does not mean that whenever there is an order for sale of land by public auction either by order of court under s 256 or by the land administrator under s 263 the land in question cannot in any circumstances be sold by private treaty. In my view the proposition in *Packiri Maideen's* case that '... but once proceedings are commenced the lands have to be sold by public auction' is no longer valid in view of the provisions of s 266(1) of the National Land Code which states as follows:

> 266 Right of chargor to tender payment at any time before sale.
>
> (1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in subsection (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.

There was no similar provision in the Land Code (Cap 138). In my view the court may allow a chargor of any land to sell the land in question by private treaty in circumstances where the court is satisfied that the proceeds of such sale are not less than the amount due to the chargee under the charge and that the chargee will be duly paid in full out of the said proceeds.

In this case the defendants' application is to sell the properties at the purchase price of $210,000 when the amount still due under the charge was $524,660.91 as at 14 April 1987.

I therefore dismissed the defendants' application. The plaintiffs' application had already been dismissed in chambers.

Application dismissed.

Solicitors: *Charles Rajah & Co; J Balan & Co; Anamalai & Co.*

Reported by *Yap Shao Sin*

Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Ling Beng King

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D1-22-187-88
GUNN CHIT TUAN J
3 MARCH 1989

Banking – Sale of shares in licensed bank – Prior approval of Minister of Finance needed – No specific performance of sale agreement as no approval was obtained – Banking Act 1973, s 23A

Contract – Sale of shares in licensed bank – Prior approval of Minister of Finance needed – Whether non-disclosure of request for approval fatal to application for interim injunction to restrain sale to other persons – Whether specific performance of sale agreement can be given when no approval was obtained – Object of sale agreement contrary to public policy – Banking Act 1973, s 23A – Contracts Act 1950, s 24(e)

In this case, the defendant applied for an order to set aside the interim injunction obtained against him by the plaintiff. The injunction restrained the defendant from entering into any agreement with any party other than the plaintiff in the sale of certain shares held by the defendant until final determination of the suit filed by the plaintiff. The defendant also applied for the plaintiff's writ of summons and statement of claim to be struck out pursuant to O 18 r 19(1) of the Rules of the High Court 1980.

The defendant contended that (a) there had been non-disclosure of material facts on the plaintiff's part in that when she applied for the interim injunction she never disclosed to the court a letter written by her former solicitors, M/s Skrine & Co,